85-1958

No. _____

Supreme Court, U.S.
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CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

May Term, 1986

AVABELLE BASKETT, ET AL., PETITIONERS

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CLAIMS COURT

PETITION FOR WRIT OF CERTIORARI

Norman E. Hay
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Cannelton, Indiana 47520
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Attorney of Record for Petitioners

1.(a) QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ruling of the Court of Claims (Appendix pp. 7-152) and Federal Court of Appeals (Appendix pp. 1-6) is contrary to the record evidence of the trial.

2. Whether it was error for the trial judge to prohibit the testimony of federal judges, government attorneys, and other government employees from testifying in these cases as regards the nature and extent of flowage easements condemned by the defendant (Appendix pp. 153-227).

3. Whether it was error for the trial judge to refuse to mention any plaintiff by name or refer to any plaintiff's property specifically as regards the pre-dam and post dam conditions of the property.

4. Whether it was error for the trial judge to refuse to determine a

new Ordinary High Water Mark, (OHWM), or Ordinary High Water Line, (OHWL), where governmental action has completely washed away easements procurred prior to pool raises.

5. Whether it was error for the trial judge to ignore previous condemnation cases that determined that there was insignificant erosion above OHWM set by the condemnation courts.

6. Whether the Court erred in denying plaintiffs' claims where such denial was in direct conflict with the prior decision of the same Court in Tri-State Materials Corp. v. United States, 313 Ct. Cl. 1, 550 F.2d 1 (1977); Cloverport Sand and Gravel Co. v. United States, 6 Cl. Ct. 178 (1984), ____F.2d ____; and in the Fourth Circuit Court of Appeals United States v. 21.54 Acres of Land, Marshall Cty., W.Va., 491 F.2d 301 (1973).

(b) PARTIES TO THE PROCEEDINGS

David Alexander
David Allen and Eva Allen
Earl C. Barks
Avabelle Baskett
John B. Bell and Nancy B. Bell
Boone County, State of Kentucky
Marvin Bruington
Mary Stephenson Buechter
John Campbell
Phillip Campbell
Gilbert and Sharon Cannon
Malcolm Carraco
Richard Chamblee and Joan Chamblee
City of Covington, Kentucky
City of West Point, Kentucky
Harry H. Cline, Jr., and Rosemary Cline
Minnie Cline, Executor, Estate of Harry H. Cline, Sr.
Bayward J. Cole and Mary Ann Cole
Dorothy Cole
James L. Cole
Elmer Cooper
Estelle Crowe
John W. Crowe, Jr. and Kathleen Crowe
Harold Cunningham and Julia Cunningham
Hazel Edgerton
George E. Egger
Clara E. Elder
William Gerdon
Mabel Gibson, Executrix, Estate of Jesse O. Breeden
Edward Goss and Helene L. Goss
Francis P. Hagman
Harold Hagman and Dorothy Hagman
Harold V. Hagman, Jr.
Edith S. Haynes
Louis N. Hemer and Phyllis M. Hemer
Hendry Acres, Inc.
Margrete Nielsen Heron
Walter Hollis and Ruth Hollis
Gary B. Johnson and Diana M. Johnson

Elmer Lee Jones
Charles E. Keller, Jr.
Nettie G. King. M.D.
Chester Klinstiver
Ed Knear
Mackey Knear and Mary Jane Knear
Arthur Kruger
Dorothy A. Stephenson Krutz
Charles Leedy
Bruce K. Lorch
Paul Lutgring
Earl Mangin
Wallace Mangin
Heirs of Howard B. Marrs (John Allen Marrs, Betty Marrs Bryant, James William Marrs, Benjamin Black Marrs, Jane Marrs Senn, George Ralph Marrs)
Carl Marshall
Raibourn McGee and Kathy S. McGee
Joseph A. Nelson
George Nienaber and Charmaine Nienaber
Brig. Gen. Thurman Owens, USMC (Ret.) and Phyllis M. Owens
Benjamin I, Perchik and Helen Perchik
Pike Heirs
Michael E. Popham
N. A. Popham
Hobert Rayburn and Helen H. Rayburn
Ben A. Reid, M.D.
Lorena S. Richardson
River Ridge Park, Inc.
John H. Rolsen and Loretta Rolsen
Henry L. Rudd and Helen Jean Rudd
Thomas Schaeffer, Trust Officer, Citizens National Bank of Tell City, Indiana, Personal Representative of Estate of Charles Lutgring
William Schrader and Caroline Schrader
Ora C. Shacklette
Alvin E. Shearn
Charlotte Simonson

Roy C. Sonner
Southern Indiana Rural Electric Coop. Inc.
Carl E. Stauth
John B. Taylor, Jr., and Sally C. Taylor
John B. Taylor, Sr., and Nancy Keith Taylor
Taylor Properties, Inc.
Emmett Terry and Mildred Terry
Herman E. Williams
Dorothy Winkler
C. H. Withers

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and
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(d) REFERENCE TO OPINION

The United States Court of Appeals for the Federal Circuit decision is not reported. Avabelle Baskett, et al. v. The United States, No. 85-2570, decided February 25, 1986.

The United States Claims Court decision is reported as Baskett v. United States, ___ F.2d ___, United States Claims Court, Nos. 161-78, 340-78, 317-79L, 311-80L and 616-80L, decided May 10, 1985.

(e) JURISDICTION OF THE COURT

(i) Plaintiffs' claims are for compensation pursuant to the United States Constitution, Amendment Five, for taking of riparian farmland by the United States Corps of Engineers. "Tucker Act" confers jurisdiction of claim to United States Claims Court.

(ii) Date of Judgment and Decree and time of entry in United States

Claims Court is May 10, 1985 (appendix pp. 5-152).

(iii) Federal Court of Appeals for the Federal Circuit decision that denied review of Claims Court decision is dated February 25, 1986 (appendix pp. 1-4).

(iv) Petition for Certiorari was deposited in the United States mail with proper certification to parties on May 24, 1986.

(v) Statutory provision believed to confer jurisdiction on the Supreme Court to review the judgment or decree is 28 U.S.C. §1255(1).

(f) UNITED STATES CONSTITUTION AND STATUTES INVOLVED

Fifth Amendment to United States Constitution provides in part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor shall private property be taken for public use, without just compensation."

Tucker Act, 28 U.S.C. 1491, provides

in part:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounded in tort."

Federal Government Condemnation Act

40 U.S.C. §257, provides in part:

> "In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice. (Aug. 1, 1888, C. 728, §1, 25 Stat. 357; June 25, 1948, c. 646, §6, 62 Stat. 986)."

(g) STATEMENT OF THE CASE

Plaintiffs owned homes, other buildings, and land adjacent to "Ohio River". The United States Corps of Engineers built a series of high-lift navigation dams on the "Ohio River". Flowage easements were procured by condemnation or by threat of condemnation in Federal District Court: from all of the 85 plaintiffs herein except six.

Claims Court opinion gives maximum pool raises for Meldahl Dam as being 29.6 feet; Cannelton Dam as being 25 feet (App. pp. 16-26). Not noted in opinion but Markland Dam normal pool elevation of 485 m.s.l. raised water level 35 feet above normal pool elevation of McAlpine Dam of 420 feet m.s.l., and McAlpine Dam raised normal pool elevation of Cannelton Dam of 383 m.s.l. by 37 feet; and Newburgh Dam raised water level 16 feet above normal

pool elevation of Uniontown Dam of 342 m.s.l.

Noted pool raises are much more substantial than those decided in the United States v. Dickinson case, infra, where water was only raised 11.4 feet.

Trial Judge noted in his opinion that easements procurred by defendant gave defendant the right to permanently and/or occasionally overflow, flood and submerge riparian fast lands, i.e., lands above the ordinary high water mark (OHWM), above-stated elevations. These flowage easements also gave the Corps the continuing right to clear and remove, below stated elevations, timber, brush, debris and natural obstructions which in the opinion of the Corps may be detrimental to the dam project. (App. p. 18, n. 5.)

Plaintiffs claimed damages from flooding of their lands and erosion

damages from water waves at the new pool elevations.

Trial judge's noted in his opinion that the trial record in these cases was voluminous encompassing over 10,000 pages of testimony and over 1300 exhibits. The court heard testimony from 85 witnesses for the plaintiffs and 10 witnesses for defendant. (App. p. 9, n. 4.) The pages and exhibits were used by the plaintiffs to show the before pool raise, and after pool raise conditions of each plaintiffs land. About 1,000 of noted exhibits were river flow data regarding the before pool raise and after pool raise flows of the river. "Ohio River" is like a 981 mile long bath tub that is three-fourths full of water before rain fall. Neither a bath tub or a 981 mile long river will immediately drain when rain water is added. Therefore rain water will flow

on top of impounded water at higher elevations than the water would have flowed prior to the impoundment or filling the bath tub two-thirds full of water.

This petition is the last opportunity for plaintiffs to have a fact finder to review evidence in these simple damage claims. Trial Judge Thomas J. Lydon of Claims Court and Appellate Court Judges Davis, Smith and Newman never at any place in their opinions mention any plaintiff by name or the before and after condition of any of the plaintiffs' properties regarding damages to their property. That's like deciding a home or automobile damage claim without deciding the before and after condition of the properties in dispute. Such findings are a blatant denial of due process.

Plaintiffs, 23 in number, were

similarily treated by their federal judiciary in Loesch v. United States, 227 Ct. Cl. 34, 645 F.2d 905, cert. denied 454 U.S. 1099 (1981), on other grounds.

Plaintiffs in instant case suffered the further indignity of a judge's order that prevented them from deriving the benefits of testimony of Federal Judges, United States Attorneys, and other witnesses whose testimony would have saved plaintiffs from suffering from the miscarriage of justice suffered by the 23 plaintiffs in Loesch, supra.

These claims are simple water and soils cases where plaintiffs must prove that before construction of high-lift dams there was little or no erosion on their "fast lands", and subsequent to agents of defendant constructing high-lift dams there was massive erosion on their "fast lands". The United States

Supreme Court in United States v. Cress, 37 S.Ct. 380, 382, 243 U.S. 316, (1917), defined the navigational servitude in terms of a natural river:

> ". . . by an unbroken current of authorities it has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hinderance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation, with appropriate compensation for the private right. Cases exemplifying these propositions are cited in a marginal note". (emphasis added.)

UNITED STATES SUPREME COURT HAS DECIDED ALL ISSUES MATERIAL TO THIS LITIGATION

United States v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1795, (1947), is a simple water and soils

case. Government dam raised pool level 11.4 feet from 554.6 m.s.l. to 566 m.s.l. Trial court awarded damages for permanent pool raise and granted government an occasional flowage easement from elevation 566 to elevation 574 upon plaintiffs complaint that water waves eroded banks to elevation 574. Fifth Circuit Court of Appeals sustained trial court and Supreme Court granted certiorari.

United States Supreme Court held in United States v. Dickinson, supra:

> "Each respondent is entitled to recover the damages to the residue of his tract of land, above that permanently or intermittently flooded, caused by and which are the proximate result of the taking of the part appropriated; such damages include erosion due to the saturation and softening of the soil and wave action thereon; and where such damages can be prevented by timely protective measures at a cost of less than the amount of the damages which will ensue if permitted to go unchecked, the measure of compensation is the cost of such

protective work. . . ."

". . . These suits against the Government are authorized by the Tucker Act either as claims 'founded upon the Constitution of the United States' or as arising upon implied contracts with the Government. . . . "

". . . Of course, payment need only be made for what is taken, but for all that the Government takes it must pay. When it takes property by flooding, it takes the land which it permanently floods as well as that which inevitably washes away as a result of that flooding. The mere fact that all the United States needs and physically appropriates is the land up to the new level of the river does not determine what in nature it has taken. If the Government cannot take the acreage it wants without also washing away more, that more becomes part of the taking. . . . "

Justice Frantfurter cited about 90 condemnation cases sustaining his opinion.

Plaintiffs were taught to believe and do believe that federal judges and government attorneys are very forthright honest individuals that search for the truth before making a decision.

Federal judges and government attorneys in every one of these cases, except six, told the plaintiffs that nature in a million years or so of history did not wash away their land above the OHWM, and so that the government had to pay compensation above that line in order to comply with the United States Constitution. That compensation was paid either through court action or through agreements prepared by government attorneys. These decisions were supported by maps, surveys and mainly photographs of the land to determine the OHWM.

COURTS HAVE ALREADY DECIDED THE "OHIO RIVER" CASES

Government lawyers argued that OHWM as determined by them in an "Ohio River" case where high-lift dam, Hannibal Dam, was constructed in the Pittsburgh, Pennsylvania area, could only be decided by them and not the Court.

Appellate Court held only the judge could decide the proper OHWM under Tucker Act, supra, then jury would determine damages, United States v. 21.54 Acres of Land, Marshall Cty., W.Va., 491 F.2d 301 (1973):

> "[2] It is also possible for the government to proceed under what is generally known as 'inverse condemnation.' In this situation, no formal declaration of taking is filed. The landowner, however, is not without a remedy. At any time within the six year period following the taking of his property, he may institute a suit under the Tucker Act against the United States in the Court of Claims or in the United States District Court if the amount claimed does not exceed $10,000.00. See 28 U.S.C. §§1436, 1491, 2501. In either case the issue of just compensation is not resolved by a jury. 28 U.S.C. §2402; Ct. Cl. R. 52-53."

Another "Ohio River" case in the Pittsburgh, Pa., area where Racine High-Lift Dam was constructed government lawyers argued only "Nature's Water" caused floods and not "Government's Water". Government condemned

land for new pool elevations, and the parties reserved right to file additional claims for damages subsequent to pool raises.

Plaintiff was in Court of Claims in that flooding damages were in excess of that determined by the condemnation court in the Racine Dam case. Tri-State Materials Corp. v. United States, 550 F.2d 1, 3, (1977):

> "Although it is undisputed that the Government action precipitated the subflooding, the Government contends that this subflooding was only temporary. To this date, the water table level remains at 560 feet msl, but the Government argues that natural forces from non-Government sources have overcome and replaced the Government floodwaters. Essentially, the Government is contending that 'its water' has receded and been replaced by 'other water'.
>
> The Government also says that the 22 feet of permanent flooding is not due to 'sub-flooding', but due to 'the blocking of drainage within the banks of the Ohio River', and that blocked drainage is a noncompensable taking. . . . "

Court of Claims Judges Skelton, Kunzig,

and Bennett held for plaintiffs, saying:

> "Defendant's argument that natural water sources have replaced the original Government floodwaters, and, therefore, compensation is not required must fail. United States v. Kansas City Life Ins. Co., supra; Goose Creek Hunting Club, Inc. v. United States, supra; Fromme v. United States, supra.
>
> By virtue of the same authorities, Governmental action creating a blockage of drainage is a compensable taking. The navigational servitude is not relevant to the facts of this case.
>
> Accordingly, since there nas been Governmental action in this case resulting in permanent damage to the plaintiffs, we grant the plaintiffs' motion for summary judgment and remand the case to the trial division for a determination of damages under Rule 131(c)." Tri-State Materials Corp. v. United States, 550 F.2d 1, (1977).

In another "Ohio River" case in Cannelton pool where trial judge in his opinion, (app. p. 23), stated 54 plaintiffs are located the parties in condemnation trial reserved right to try flooding damage after pool was raised.

Government attorneys admitted liability in 1978 and court held in Cloverport Sand and Gravel Co., Inc. v. United States, U. S. Claims Court, Docket No. 344-78 (1984). Page 10 of opinion states that plaintiff filed suit on June 17, 1977; plaintiff filed motion for summary judgment on issue of liability February 8, 1979, and the defendant admitted liability on October 19, 1979. Judge Yock calculated damages at page 28 on basis that all witnesses agreed that the water would cause slopes to change from 1:3 to 1:11.

THERE WILL ALWAYS BE HONEST PEOPLE IN GOVERNMENT

Employees of the Defendant in the year 1968 prepared at taxpayers expense, very extensive, well documented report that proved the navigation dams under jurisdiction of the Pittsburgh, Pa., District Office of the Corps caused

erosion on landowners land. (Hannibal Report, DX 1280(C),(D), Tr. 6665). They also prepared a report of Predicted Bank Erosion Caused By Construction of Hannibal High-Lift Dam on the Ohio River, (DX 1290[L], 8 pgs. Tr. 6737). Basis for the report was the United States v. Dickinson case, supra. Report states and I quote:

> "A. The banks along the Ohio River within the limits of the approved Hannibal Pool are subject to scour and wave erosion due to the inherent characteristics of the typical flood plain sediments in this area. These sediments consist primarily of fine, clayey silts, and sandy silts as shown on figures 1 though 8. Because these materials will erode rapidly within predictable limits, either bank protection or additional acquisition of property is considered to be a necessary consequence of changing old pools nos. 12, 13, 14, and 15 from normal pool elevations of 626.3, 617.8, 610.5 and 602.2 respectively, to the new approved Hannibal normal pool elevation of 623.0. Erosion will occur on the existing banks when the approved new Hannibal pool elevation is established; sections of these banks are shown on Exhibit C.

> B. The proximate cause for the erosion damage is the change in elevation of the pool. From past studies and from a study of velocities in the Hannibal Pool, it appears that little of the erosion observed on navigable streams in the Pittsburgh District has been caused by river velocity. The major part at the new pool level, instead, has been due to the waves generated by river traffic; this has been established and dealt with in more detail in reference 3.a.

TRIAL JUDGE CONFUSED BY FLOWAGE EASEMENTS

The trial judge in this case demonstrated in Loesch, supra, that he does not understand flowage easements.

He states easements mean one thing on erosion issue with well documented black letter law that he decided in Loesch, supra, and affirms here in his decision, (App. p. 35), partially quoted here:

> ". . . stated in pertinent part in United States v. Willow Creek Power Co., 324 U.S. 499, 509 (1945); 'High water mark bounds the bed of the river. Lands above it are fast lands and to flood them is a taking for which compensation must be paid.

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> . . . Lands below that level are subject always to a dominate servitude in the interest of navigation and its exercise calls for no compensation.'" (Note 9, Cont'd App. pg. 233).
>
> "Plaintiffs' claim for damages must be restricted to the land above the flowage easement taken if any were indeed taken on their land. Their claim for damages must be from new OHWM (the upper limit of the flowage easements taken) and up. See Loesch v. United States, supra, 227 Ct.Cl. at 43-44, n.7, 645 F.2d at 913-14, n.7." (Note 10, App. pg. 38).

Ninety-four pages later in his opinion on statute of limitations he says the exact opposite:

> "Plaintiffs, both anticipating defendant's statute of limitations argument and responding thereto in their post trial submission appear to argue that until the easement areas taken by the Corps are completely washed away, the landowners' cause of action does not accrue. Plaintiffs argue that none of the easement areas on the plaintiffs' properties had completely eroded away more than 6 years prior to each plaintiff filing suit. Plaintiffs cite United States v. Dickinson, supra, in support of their argument that the 'taking' in these cases is continuous and was not completed

> Prior to the filing of their petitions (complaints). Therefore, they conclude the statute of limitations is not a bar to any of their suits. (App. pp. 132-133).

He goes on to say after second quote that about all of plaintiffs testified that they noted river bank erosion right after pool raises, and so cases are probably time barred even though defendant never submitted any evidence on this point. (App. pp. 133-152).

MOTION IN LIMINE

As noted above in the "Ohio River" cases the federal judges, government attorneys and other government employees did the best they could in the flowage easement condemnation trials. Rather than having the judges and juries speculating on how much land would wash away when pools were raised, they advised landowners to wait and see for further litigation under "Tucker Act". Trial Judge barred anyone from flowage ease-

ment trials from testifying; Judges attorneys, appraisers, landowners, U.S. Senator, U. S. Army personnel, etc., (App. pp. 203-223).

ALL LOSSES OF PLAINTIFFS WERE IN AREAS WHERE GOVERNMENT ACQUIRED NO RIGHTS TO FLOOD

All ossses were proved by use of 1911-1914 land survey maps that United States Supreme Court recently used to resolve border dispute case on low water mark as it existed in 1897. Ohio v. Kentucky, 444 U.S. 335, (1980).[1/]

(h) QUESTIONS PRESENTED REQUIRE PLENARY CONSIDERATION

Either United States Supreme Court,

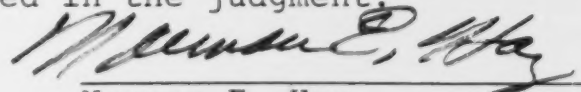
1/ Examples of losses are: H. Cline, Jr., lost 246,500 sq. ft. of land; Gen. T. Owens USMC (Ret.), 12, 100 sq. ft., and his 100 year old home; J. Taylor, Jr., 540,000 sq. ft; G. Egger, 2,400,000 sq. ft.; H. Marrs, 132,000 sq. ft., (this property was rip-rapped in 1983 at government expense to prevent loss of other government property). Losses in Cannelton Pool are hugh: M. Knear, 450,000 sq. ft.; A.Baskett, 360,000 sq. ft.; N.Popham, 540,000 sq. ft.; H. Williams, 2,494,800 sq. ft.; Hendry Acres, 300,000 sq. ft.; P. Lutgring 483,000 sq. ft., (Government rip-rapped this property in 1983 to stop highway from washing into river).

all judges in the original flowage easement trials, all previous rulings in Ohio River cases are wrong, or Judges Lydon, Davis, Smith and Newman are wrong in this case. Determining the truth and rendering just decisions is a personal matter. Subsequent to United States v. Dickinson decision, supra, the U.S. Army personnel in Pittsburgh District did have some "Ohio River" litigation but once their study was completed they went ahead and personally made a decision to purchase the additional flowage easements.

Judges and Government attorneys personally advised in the original flowage easement trials that further litigation was needed after extent of erosion was determined. Baskett judges on other hand impersonally ignored all plaintiffs. Never once did they mention a plaintiff by name or refer to his home, his farm,

his highway, or any before and after conditions of any of their properties. No losses of acreage was mentioned in opinion. Not once did they ever refer to the former personal repartee between plaintiffs and other agents of defendant in the original flowage easement trials.

WHEREFORE, Petitioners pray for an opportunity to submit a brief and oral argument on the merits of plaintiffs petition for resolution by United States Supreme Court. Plaintiffs feel that they are entitled to a personal judgment where at least their name and the before and after condition of their property is mentioned in the judgment.



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